SUPREME COURT, U. S.

MAR 26 1969

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1103

JAMES A. GAINEY and J. L. YOUNG
Individually and on Behalf of Others Similarly Affected,
Petitioners

v.

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES AND THE PENNSYLVANIA RAILROAD COMPANY

BRIEF IN OPPOSITION

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March 25, 1969

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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BRIEF FOR RESPONDENT BROTHERHOOD

QUESTIONS PRESENTED FOR REVIEW

Whether the Trial Court (affirmed by the Court of Appeals) correctly applied to the facts proved of Record, the rules of fair representation declared by this Court in *Steel* v. *Louisville and Nashville Ry.*, 323 U.S. 192 and elaborated in subsequent decisions, notably *Vaca* v. *Sipes*, 386 U.S. 171, and the earlier decisions in this controversy, *Gainey* v. *Pennsylvania Railroad*, 275 F. 2d 342, (cert. denied 363 U.S. 811), and *Gainey* v. *Brotherhood*, 313 F. 2d 318.

Whether the Court has the power to (and if it does have the power, whether it should) order the Brotherhood to submit to mediation a dispute, now seventeen years old, which the Brotherhood, in good faith, decided to be without merit.

STATEMENT OF THE CASE

This is a class suit, filed in behalf of a group of freight house workers known as tallymen employed in Philadelphia against their union and their employer, the Pennsylvania Railroad. The claim against the union is based on alleged breach of its duty of fair representation. The claim against the Railroad (which was not pursued in the lower courts, although not abandoned) is based upon alleged conspiracy with the union to deprive plaintiffs of their rights. Both claims are based upon an alleged agreement between the union and the railroad to increase the wages of tallymen in the Eastern Region of the Railroad (east of Altoona Pa.) to the level of those paid in Pittsburgh and the Central Region.

This "agreement" was an informal conversation on the main floor of 30th Street Station, Philadelphia, between the union's general Chairman and a subordinate officer of the Railroad, on April 18, 1950, confirmed by a letter from the union to a higher officer of the Railroad dated April 21, 1950. The gist of the proposal was that the Brotherhood would agree to the abolition of "tonnage" pay at Philadelphia Transfer if the Railroad would increase the pay scale in the whole Eastern Region to that paid in the Central Region, particularly at the Pittsburgh Eleventh Street Station. The higher officers, after studying the proposal refused to accept it. The Brotherhood nevertheless pushed the proposal for something over two years. In the course of these negotiations it was found that there were a number of different rates (estimated at nine) in the Central Region. Pittsburgh Eleventh Street was the highest. The Railroad representative suggested that three sets of rates (depending on the size of the station) be established in both regions. This would have meant advances for some men, reductions for others. The suggestion was rejected by the Brotherhood's representative.

Philadelphia Transfer was a facility for the transfer of less-carload freight from car to car and platform to car. At Philadelphia Transfer, but not elsewhere in Philadelphia or in the Eastern Region (except Trenton, New Jersey) there was an incentive arrangement known as "tonnage". Under this arrangement gangs which moved more than a specified tonnage a day received a bonus. About 15% of the tallymen earned a bonus. The other 85% were paid hourly rates, as were the tallymen elsewhere.

On June 29, 1952 the Railroad abandoned Philadelphia Transfer and transferred the tallymen and other freight handlers to other stations. Both the plaintiffs and the System representatives of the Brotherhood co-operated in facilitating the transfers. Plaintiffs' representative expressed satisfaction with the handling of the changeover at the time; no one suggested that an injunction against the Railroad be sought.

In July 1952 the Railroad advised the Brotherhood that the proposal to increase the wages of Eastern tallymen to Pittsburgh rates was dead. The responsible officers of the Brotherhood, after considering the matter, decided not to go to mediation. This decision was made in good faith as the Trial Court, on abundant evidence, found. (App. p. 49)

In 1959 Plaintiffs brought a suit in the Federal Court based on this, the tallymen's, dispute. Upon motion to dismiss the lower court found that there was no agreement between the Brotherhood and the Railroad in this matter. *Gainey* v. *Pennsylvania Railroad et al,* 177 F. Supp. 421. The Court of Appeals affirmed, 275 F. 2d 342. This Court denied certiorari, 363 U.S. 811. *(First Gainey)*

Thereafter Plaintiffs brought a second suit based on the same cause of action but with broader averments. The District Court, on motion, dismissed the complaint.

The Court of Appeals again affirmed, holding that there was no agreement and that Plaintiffs had not sufficiently averred a violation of the Brotherhood's duty of fair representation. *Gainey* v. *Pennsylvania Railroad, et al,* 313 F. 2d, 318. *(Second Gainey)*

In 1963 Plaintiffs filed this, the *Third Gainey* case, on averments still broader than those of *Second Gainey.* This case was tried without jury by a judge who gave plaintiffs the broadest latitude to prove hostile discrimination, not only in the tallymen dispute but in a variety of other matters. He found that there was no prejudicial action by the Brotherhood. *Gainey* v. *Brotherhood of Railway and Steamship Clerks, et al.* 275 F. Supp. 292, Appendix p. 21. The Court of Appeals affirmed (Appendix p. 17) and denied Rehearing (Appendix p. 20).

ARGUMENT

(As an addendum to this brief we note statements in the petition which we believe to be unsupported in the record.)

The basis of the petition is that the lower courts did not correctly apply to the facts of this case the rule of fair representation enunciated by this Court in *Steele* v. *Louisville and Nashville Ry.* 323 U.S. 192, and elaborated in subsequent opinions. Petitioners also suggest that the application of this principle to the facts of this case in *Second Gainey* was a "narrow concept of the prohibited discrimination."

We submit that the criteria defined by the Court of Appeals in *Second Gainey* were correct. On this petition, however, we assume that this Court will apply the standards set up in its own opinions. We submit that the courts below correctly applied to the facts of this case the rules laid down by this Court in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, *Humphrey* v. *Moore,* 375 U.S. 335, and, especially, *Vaca* v. *Sipes,* 386 U.S. 171.

Petitioner argues that "giving monthly salaries to Central Region tallymen, and lower hourly rates to Eastern Region tallymen**** is the rankest type of discrimination." (Petition, p. 12)

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. *The mere existence of such differences does not make them invalid.* The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargainning representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." (emphasis added)
> *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338.

The evidence shows that there were from three to nine different scales of wages in the Central Region and differences in the complexity of the operations and in the duties of tallymen, especially as to the clerical work done at different locations.

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance process."
> *Humphrey* v. *Moore,* 375 U.S. 335, 349-350.

Petitioner contends that refusing to invoke the machinery of mediation is in itself discrimination. (Petition, p. 12) Not so, said the lower courts; the inaction must be

"motivated by bad faith, for the gravamen of the rule is 'hostile discrimination' ". (App. c, p. 38)

> Not so, said this Court in *Vaca*.
> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."
> *Vaca* v. *Sipes*, 386 U. S. 171, 190

In *Vaca* the employee proved that his case, which the union had refused to push to arbitration, actually did have merit, but this Court held that that did not give a cause of action in the absence of bad faith.

> "Having concluded that the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here."
> *Vaca* v. *Sipes* supra.

In this case the Plaintiffs did not even prove that their claim was meritorious; the case rested on an alleged "agreement" which, often labored at the trial, turned out to be no agreement at all.

Petitioners also urge that the Court should compel the union to invoke mediation. (Petition, p. 14) In the absence of proof of bad faith, the Court has no such power. As this Court said in Vaca,

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the

individual grievant to the vagaries of independent and unsystematic negotiation."
Vaca v. *Sipes*, supra, p. 191.

Even if the Court had had the power to compel the union to invoke mediation it would have been a gross abuse of discretion to have done so. In the sixteen years since this problem was laid to rest the Railroad's less-carload freight practices have changed. There is no evidence of the present wage scales in either region, no evidence of how much, *if any*, of the less-carload freight still moves on rails, where and by what processes this traffic, to the extent it may still exist, is handled. The evidence does show that Pittsburgh Eleventh Street Station (equalization with which is the very core of Plaintiffs' demands) was abandoned years ago.

CONCLUSION

That this case is of interest only to the parties, and presents no problems of importance to others, is implicit in this Court's refusal of certiorari in *First Gainey*, 363 U.S. 811. After twice dismissing the suit on motion, the lower courts gave Plaintiffs a chance to prove their averments. Plaintiffs made no attempt to prove the more lurid allegations and failed miserably to prove any conspiracy or hostile discrimination. The issue is factual, not legal; the proven facts have been carefully measured by the lower courts against the standards set up by this Court.

The petition should be dismissed.

ALLEN S. OLMSTED, 2ND
Attorney for Respondent Brotherhood of Railway and Steamship Clerks, etc.

ADDENDUM

Comments on Statements in the Petition which are Believed to Lack Support in the Record

1. "* * the Brotherhood's General Chairman testifies that he reached an agreement with the *carrier* to increase the pay of petitioners * * " (p. 3) (emphasis added)

   "* * the agreement which the General Chairman testifies had been reached * * " (p. 3)
   Similar statements appear on pages 5, 6, 12.

The Brotherhood's General Chairman testified that his conversation was with a minor official of the Railroad, and that the responsible officers refused to ratify the arrangement. Plaintiffs' contention in the trial court was that the account given by three witnesses, supported by a written minute, was all perjury. The trial Judge refused to accept this fantastic version. (Appendix pp. 32-34).

2. " * * so that it would equal that of other workers, in another area, *doing the same work* * * " (p. 3 emphasis added)

   " * * fellow workers doing the same work * * " (p. 3)
   Similar statement at p. 13.

The Plaintiffs testified that the work at Pittsburgh Eleventh Street was the same as at Philadelphia Transfer; Defendant's testimony showed substantial differences in the operation and in the duties of tallymen. There is no evidence of work duties elsewhere in the Central or in the Eastern Region.

3. " * * the carrier * * * terminates the collective bargain in force * * " (p. 3)
   A similar statement appears on page 6.

The carrier abandoned the only station at which incentive pay was applicable.

4. "* * * tallymen, ninety percent of whom are Negroes * *" (p. 4)

The record shows that whites and blacks were employed as tallymen, both in Philadelphia and in Pittsburgh. It does not show the percentage at either station.

5. "On the Eastern Region about fifteen percent of the tallymen were operating under an incentive program called "Tonnage Agreement**" (p. 5)

The evidence is that *all* of the tallymen at Philadelphia Transfer, and *none* of the tallymen elsewhere in the Eastern Region were operating under "Tonnage"; that fifteen percent of the tallymen at Philadelphia Transfer *earned* bonus pay, and the other eighty-five percent did not.

6. "*To this day* tallymen on the Eastern Region are still paid at an hourly rate and receive less money than their Central Region counterparts" (p. 8, emphasis added)

The evidence concerned only the pay schedule in the 1950's. We cannot state the actual situation today without going outside the record.

7. "Thus the plaintiffs who have lost to date more than five million dollars in earnings**" (p. 9)

At plaintiffs' suggestion the Court did not go into the matter of earnings, and there is no evidence on the point.